INDEX.

	Page
The Federal question involved	2
The Non-Federal questions involved	3
In any event, Non-Federal grounds utilized as a basis for the opinions and decisions below are plainly untenable and without any fair or substantial support, and, therefore, cannot serve to defeat review	6
Conclusion	13

Cases Cited.

Baltimore & Ohio R. Co. v. Kepner, 314 U. S. 44, 62 S. Ct. 6, 86 L. Ed. 28	3
Central Illinois Public Service Co. v. Industrial Commission, 293 Ill. 62, 127 N. E. 80, 82	8, 9, 10, 11, 12
Davis v. Packard, 6 Pet. [31 U. S.] 41, 8 L. Ed. 312	3
Enterprise Irrigation Dist. v. Farmers Mutual Canal Co., 243 U. S. 157, 37 S. Ct. 318, 320-321, 61 L. Ed. 644	5
Gill v. Lynch, 367 Ill. 203, 10 N. E. 2d 812	8, 9, 10, 11, 12
McDonough v. Gage, 357 Ill. 466, 192 N. E. 417, 419	10
Miles v. Illinois Central R. Co., 315 U. S. 698, 62 S. Ct. 827, 86 L. ed. 1129	2, 3
Mitchell v. Louisville & N. R. Co., 379 Ill. 522, 42 N. E. 2d 86	9
Moffett v. Green, 386 Ill. 318, 53 N. E. 2d 941	9
Montgomery v. Equitable Life Assur. Society, 7 Cir., 83 Fed. 2d 758, 761	10
North Carolina R. Co. v. Zachary, 232 U. S. 248, 34 St. Ct. 305, 58 L. Ed. 591	3
People ex rel. First of Englewood Bond & Mortgage Corp., 357 Ill. 475, 192 N. E. 419, 420	10

People v. Harshbarger, 296 Ill. App. 397, 16 N. E. 2d 247 10
People v. McWeeney, 295 Ill. 161, 102 N. E. 233, 237.. 10
Ross v. Doe ex dem. Barland, 1 Pet. [26 U. S.] 655, 7 L. Ed. 302..... 3
Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 34 S. Ct. 635, 58 L. Ed. 1062..... 3
Smith v. Louisville & N. R. Co., 381 Ill. 55, 44 N. E. 2d 841 9
Ward v. Board of County Commissioners, 253 U. S. 17, 22-23, 40 S. Ct. 419, 421, 64 L. Ed. 751..... 5
Werner v. Illinois Central R. Co., 379 Ill. 559, 42 N. E. 2d 82..... 9

Statutes Cited.

Constitution of Illinois, Art. VI, Sec. 18..... 10
Illinois Revised Statutes 1941, Chap. 37, Secs. 171, 175, 177 10
Illinois Venue Act (Illinois Revised Statutes 1941, Chap. 146, Sec. 36).....7, 11, 12

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1944.

VICTOR J. HERB, Petitioner, v. NORMAN B. PITCAIRN and FRANK C. NICODEMUS, JR., Receivers for Wabash Railway Company, a Corporation, Respondents.	No. 24.
BENJAMIN F. BELCHER, Petitioner, v. LOUISVILLE & NASHVILLE RAILROAD COMPANY, a Corporation, Respondent.	No. 25.

On Certiorari to the Supreme Court of the State of Illinois.

PETITIONERS' REPLY BRIEF.

As we understand it, it is the position of the respondents that the decisions here under review

(1) do not involve any federal question decisive thereof,

(2) rest entirely upon non-federal grounds, and

(3) in any event, are correctly decided.

These contentions are necessarily intermingled somewhat in any discussion of them, but they are, we submit, readily demonstrated to be without substantial merit.

The Federal Question Involved.

At pages 11-12 of our original brief herein, we pointed out that the real basis for the opinions and decisions here under review was that the terms of Section 6 of the Federal Employers' Liability Act required not only that an employee's action under the Act be brought within the time specified in that section, but, also, that the suit be brought within that time "in a court having jurisdiction to hear and determine it"—that is to say, a court having full and complete jurisdiction of the action.

The respondents fully agree with our position, for, at page 5 of their brief, they say:

> "The opinion and decision of the Supreme Court of Illinois was based largely upon petitioner's (plaintiff's) failure to 'commence' his suit *in a court of competent jurisdiction* within two years after sustaining his injuries, *as required by Sec. 6 of the Federal Employers' Liability Act,* * * *." (Emphasis supplied.)

Throughout respondents' brief, the words "a court of competent jurisdiction," emphasized by us in the foregoing quotation, are treated as the equivalent of, and used interchangeably with, the words "a court having jurisdiction to hear and determine the action," or the words "a court of competent jurisdiction to hear and determine the subject matter of the controversy"—i. e., a court having full and complete jurisdiction of the action.

Clearly, the determination of the requirements of Section 6 of the Federal Employers' Liability Act for the maintenance of employees' actions under that Act—which determination respondents concede was the basis for the opinions and decisions below—involves a federal question, for such a determination involves the construction of that section of the Federal Act and the determination of the respective rights of the parties thereunder. (Cf. *Miles v. Illinois Central R. Co.*, 315 U. S. 698, 62 S.

Ct. 827, 86 L. ed. 1129; *Baltimore & Ohio R. Co. v. Kepner*, 314 U. S. 44, 62 S. Ct. 6, 86 L. Ed. 28; *Seaboard Air Line R. Co. v. Horton*, 233 U. S. 492, 34 S. Ct. 635, 58 L. Ed. 1062; *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 34 S. Ct. 305, 58 L. Ed. 591; *Davis v. Packard*, 6 Pet. [31 U. S.] 41, 8 L. Ed. 312; *Ross v. Doe ex dem. Barland*, 1 Pet. [26 U. S.] 655, 7 L. Ed. 302.)

That the determination of this federal question by the Supreme Court of Illinois in the instant case makes it the duty of this Court to pass upon these cases appears plain from the decision in *North Carolina R. Co. v. Zachary, supra*, wherein it was said (34 S. Ct., l. c. 307-308):

> "* * * since it appears that defendant expressly claimed immunity by reason of the act of Congress, and the highest court of the state either decided or assumed that the record sufficiently presented a question of Federal right, and decided against the party asserting that right, the decisions of this court render it clear that it is our duty to pass upon the merits of the Federal question."

It is, we believe, plainly apparent from the opinions and decisions here under review that, in the final analysis, they are based primarily upon the Illinois Supreme Court's construction of Section 6 of the Federal Employers' Liability Act, which construction is, we submit, erroneous in that it requires, in addition to the requirement of the Act that an employee's suit be commenced within two years after his cause of action accrued, a further requirement, not provided for in the Act, that his suit be brought within that time in a court having jurisdiction to hear and determine it.

The Non-Federal Questions Involved.

It is true that these cases involve, in addition to the above mentioned federal question, some non-federal questions such as (a) the question of when, under Illinois law,

an action is deemed "commenced," (b) questions relating to the jurisdiction of various of the courts of the State of Illinois, and (c) the power to grant changes of venue, and the effect of changes of venue, in the Illinois courts.

These non-federal questions, however, are not such that their determination affords independent grounds for the decisions now under review. The determination of whether the actions now before this Court were commenced in the Illinois courts within the requirements of Section 6 of the Federal Employers' Liability Act—which was the matter determined by the Supreme Court of Illinois—involves not only these non-federal questions, but involves as well the federal question as to what are the requirements of that section of the federal law. The federal and non-federal questions are so intermingled, interwoven and interdependent that a decision of these cases necessarily involves a determination of both types of questions. This is manifest from the language of the Supreme Court of Illinois where, in stating the question presented to, and to be decided by, it, that Court said:[1]

> "The material point for consideration is whether the plaintiff has commenced an action within two years of the date of his injury *in a court having jurisdiction to hear and determine the same, as required by section 6 of the Federal Employers' Liability Act,* by transferring the cause from a court having no jurisdiction over it at a date which, if then originally filed in the latter court, could not be maintained because not filed within the statutory time" (emphasis supplied),

and where in arriving at its decision, that Court further said:[2]

> "* * * we observe recovery under the Federal Employers' Liability Act is conditioned upon two things: (1) commencing an action within two years

1 384 Ill., l. c. 240-241, 51 N. E. 2d, l. c. 279, R. 27 in Case No. 24.
2 384 Ill., l. c. 242, 51 N. E. 2d, l. c. 280, R. 28-29 in Case No. 24.

from the date of the injury; and (2) *commencing such action in a court having jurisdiction to hear and determine the same.* * * * The plaintiff having predicated his case upon the Federal Employers' Liability Act must comply with its provisions, both with respect to the time of commencing the suit *and of bringing it in a court having jurisdiction to hear and determine it.*" (Emphasis supplied.)

The applicable principles relating to this Court's jurisdiction under these circumstances are well stated in *Enterprise Irrigation Dist. v. Farmers Mutual Canal Co.*, 243 U. S. 157, 37 S. Ct. 318, 320-321, 61 L. Ed. 644, as follows:

"Thus we are concerned with a judgment placed upon two grounds, one involving a Federal question and the other not. In such situations our jurisdiction is tested by inquiring whether the non-Federal ground is independent of the other and broad enough to sustain the judgment. Where this is the case, the judgment does not depend upon the decision of any Federal question and we have no power to disturb it. * * * But where the non-Federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain. * * * And this is true also where the non-Federal ground is so certainly unfounded that it properly may be regarded as essentially arbitrary, or a mere device to prevent a review of the decision upon the Federal question." (Authorities cited are omitted.)

In *Ward v. Board of County Commissioners*, 253 U. S. 17, 22-23, 40 S. Ct. 419, 421, 64 L. Ed. 751, this Court in this connection further said:

"The right to the exemption was a federal right, and was specially set up and claimed as such in the petition. Whether the right was denied, or not given due recognition, by the Supreme Court is a question

as to which the claimants were entitled to invoke our judgment, and this they have done in the appropriate way. It therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward nonfederal grounds of decision that were without any fair or substantial support. * * * Of course, if nonfederal grounds, plainly untenable, may be thus put forward successfully, our power to review easily may be avoided. * * * With this qualification, it is true that a judgment of a state court, which is put on independent nonfederal grounds broad enough to sustain it, cannot be reviewed by us. But the qualification is a material one and cannot be disregarded without neglecting or renouncing a jurisdiction conferred by law and designed to protect and maintain the supremacy of the Constitution and the laws made in pursuance thereof." (Authorities cited are omitted.)

In Any Event, Non-Federal Grounds Utilized as a Basis for the Opinions and Decisions Below Are Plainly Untenable and Without Any Fair or Substantial Support, and, Therefore, Cannot Serve to Defeat Review.

We submit that, even if the opinions and decisions of the Supreme Court of Illinois now under review could be said to be based upon independent non-federal grounds (which we do not, by any means, intend to concede), still, those grounds are so certainly unfounded as to be regarded as arbitrary, as a mere device to prevent review by this Court, and as discriminating against the rights of petitioners merely because those rights arose under federal law.

The respondents' contentions, that the decisions and judgments of the Supreme Court of Illinois now under review are correct and right, are based primarily upon the statement at page 41 of respondents' brief to the effect that

"In 14 Am. Jur., Sec. 167, p. 367, it is said that a universal principle, as old as the law, is that the proceedings of a court without jurisdiction are a nullity, and its judgment without effect, either on the person or property, and that *a court without jurisdiction over the subject matter of a particular case can only dismiss the case for want of jurisdiction and possesses no other power or authority.*" (Emphasis supplied.)

Upon this major premise, and upon the further premise that the Illinois City Courts had no jurisdiction "to hear and determine" petitioners' causes of action, respondents contend that the Illinois City Courts had no jurisdiction, limited or otherwise, which authorized the "commencement" of petitioners' actions in such courts and subsequent transfer of such actions, by change of venue, to courts having jurisdiction to hear and determine them.

In the absence of the Illinois Venue Act (Illinois Revised Statutes, 1941, Chap. 146, § 36), there would be little room for doubt about the correctness of respondents' position and contentions. That Act, however, destroys the common law principle which constitutes the major premise of respondents' position, and vests in every court of record in the State of Illinois (including the City Courts) a limited jurisdiction to change the venue of every action commenced therein to the proper court or county for its determination. The plain language of that Venue Act, so far as here material, provides:

"That *wherever any suit or proceeding* shall hereafter be commenced, *in any court of record* in this State, and it shall appear to the court where the same is pending, that the same *has been commenced in the wrong court or county*, then, upon motion of either or any of the parties to such suit or proceeding, *the court shall change the venue of such suit or proceeding to the proper court or county*, and the same, when the venue shall be so changed, shall be then pending

and triable in such court or county to which the same shall be so changed the same as in other cases of change of venue." (Emphasis supplied.)

The plain effect of the Illinois Venue Act was stated by the Supreme Court of Illinois, in *Central Illinois Public Service Co. v. Industrial Commission*, 293 Ill. 62, 127 N. E. 80, 82, as follows:

> "By this act it is evident that the legislature intended to and did confer *on all courts of record in this state*, without regard to any other jurisdiction either conferred upon or denied it by common law or statute, *jurisdiction to 'change the venue of such suit or proceeding to the proper court or county.'* It cannot be doubted that the power to confer that *limited jurisdiction* lies within the powers of the legislature, * * *." (Emphasis supplied.)

The decision in the case last quoted from was cited, approved and followed in *Gill v. Lynch*, 367 Ill. 203, 10 N. E. 2d 812, and the Court below, in its opinion in petitioner Herb's case, which also controlled the decision in petitioner Belcher's case, recognized and made no criticism of *those two earlier decisions which had held valid the commencement of actions in courts of record which had no jurisdiction to hear and determine them, and the transfer of such actions, by change of venue under the Illinois Venue Act, to the courts having jurisdiction to hear and determine them.*

At various places in their brief, respondents make an assertion, the effect of which is stated at page 47 of their brief as follows:

> "* * * the Supreme Court of Illinois has consistently held that *no jurisdiction of any kind* could constitutionally be granted to a City Court in a suit arising outside of the limits of the city in which such City Court is held." (Emphasis supplied.)

The cases relied upon by respondents in this connection (*Werner v. Illinois Central R. Co.*, 379 Ill. 559, 42 N. E. 2d 82; *Mitchell v. Louisville & N. R. Co.*, 379 Ill. 522, 42 N. E. 2d 86; *Smith v. Louisville & N. R. Co.*, 381 Ill. 55, 44 N. E. 2d 841) do not go nearly so far as respondents' assertion, and do no more than to hold that the Illinois Constitution prohibits the City Courts in that state from having original jurisdiction to "hear and determine" causes of action arising outside the respective cities. The power of the Legislature to confer upon the City Courts, along with all other courts of record in Illinois, a limited jurisdiction to change the venue to the proper court when the City Court is the wrong court for the determination of actions commenced therein, was expressly declared in *Central Illinois Public Service Co. v. Industrial Commission, supra,* just above quoted. Furthermore, respondents' assertion is in direct conflict with the recent decision of the Illinois Supreme Court in *Moffett v. Green,* 386 Ill. 318, 53 N. E. 2d 941, in which it was held that the City Courts have appellate jurisdiction over judgments of Justices of the Peace within the township, though the causes of action arose outside the limits of the township and city, and though the cases are tried de novo on appeal in the City Courts.

It is suggested by respondents, at pages 48 and 49 of their brief, that the Supreme Court of Illinois in *Central Illinois Public Service Co. v. Industrial Commission, supra,* and *Gill v. Lynch, supra,* did no more than to hold that the Illinois Venue Act, as applied to the circuit courts of that state—courts of general jurisdiction—authorized transfer to a proper circuit court of any suit commenced in the wrong circuit court because outside its territorial jurisdiction; that the Illinois Venue Act is not applicable to courts of special or limited jurisdiction (such as the City Courts), and does not vest in such courts a limited jurisdiction to transfer to the proper court an

action commenced in the wrong court; and that the Supreme Court of Illinois, in the cases now under review, did no more than to follow the earlier decisions in those regards.

The difficulty with these suggestions is manifold.

In the first place, the Illinois Venue Act is not limited in its application to courts of general jurisdiction. By express terms, it applies to "any court of record," including courts of record of special or limited jurisdiction, as well as courts of record of general jurisdiction, and, therefore, including the Illinois City Courts. This is plainly demonstrated, not only by the language of the opinion in *Central Illinois Public Service Co. v. Industrial Commission, supra,* but by the facts in that case, and the facts in *Gill v. Lynch, supra.*

Central Illinois Public Service Co. v. Industrial Commission, supra, involved a **statutory** certiorari proceeding commenced in a circuit court to review an award under the Illinois Workmen's Compensation Act, and the Supreme Court of Illinois there, at page 81 of 127 N. E., went to considerable length to point out that the circuit court in such a case did not act within its general jurisdiction, but, instead, acted as *a court of special and limited jurisdiction* drawn from the statute conferring it.

Gill v. Lynch, supra, involved a proceeding for the appointment of a receiver, which was commenced in a county court. The County Courts in Illinois are courts of record,[3] but they are courts of special and limited jurisdiction[4] and possesses no general equity power.[5]

---

[3] Constitution of Illinois, Art. VI, § 18; Illinois Revised Statutes, 1941, Chap. 37, § 171.

[4] Illinois Revised Statutes, 1941, Chap. 37, §§ 175, 177; Montgomery v. Equitable Life Assur. Society, 7 Cir., 83 Fed. 2d 758, 761; People v. McWeeney, 295 Ill. 161, 102 N. E. 238, 237; People v. Harshbarger, 296 Ill. App. 397, 16 N. E. 2d 247.

[5] McDonough v. Gage, 357 Ill. 466, 192 N. E. 417, 419; People ex rel. First of Englewood Bond & Mortgage Corp., 357 Ill. 475, 192 N. E. 419, 420; Gill v. Lynch, supra.

It is, we submit, highly significant that in neither of the cases just above referred to was there involved an action commenced in a court of general jurisdiction, but in both of those cases the Supreme Court of Illinois held that the Illinois Venue Act applied, and authorized the transfer to a proper court (i. e., one having jurisdiction to hear and determine the action) of an action instituted in the wrong court (i. e., one having no jurisdiction to hear and determine the action).

In the second place, if the Illinois Venue Act were limited in its application to the circuit courts of that state—courts of general jurisdiction—so as to authorize transfer to a proper circuit court of any suit commenced in the wrong circuit court because outside its territorial jurisdiction, and if as the Supreme Court said in its opinion below:[6]

> "The distinction to be drawn is that if a case is improperly filed in a court having jurisdiction of the cause generally but without its territorial jurisdiction, it may be transferred to the proper circuit court. But, if the cause is filed in a court which could never lawfully acquire jurisdiction, the transfer to a court which would have had jurisdiction gives no validity to the proceedings in the first court,"

then the Illinois Venue Act would not, as was ruled in *Central Illinois Public Service Co. v. Industrial Commission, supra,* "reach those cases begun in courts not having jurisdiction of the subject matter," and would not, as the opinions and decisions in *Central Illinois Public Service Co. v. Industrial Commission, supra,* and *Gill v. Lynch, supra,* demonstrate, apply to courts of special or limited jurisdiction.

In this connection, it is also notable that, in *Central Illinois Public Service Co. v. Industrial Commission,*

---

[6] 384 Ill., l. c. 246, 51 N. E. 2d, l. c. 282, R. 32 in Case No. 24.

supra, and *Gill v. Lynch, supra,* the courts in which the actions were commenced *could never lawfully acquire jurisdiction generally over such actions*—that is to say, jurisdiction to hear and determine those actions. Notwithstanding that, it was held in both of those cases that such actions were properly commenced in those courts and properly transferred to the courts having jurisdiction to hear and determine them.

In the third place, the distinction attempted by the Supreme Court of Illinois in the quotation just above made from the opinion of that Court in petitioner Herb's case, which is also urged upon this Court by respondents, manifestly confuses venue and jurisdiction—a confusion which respondents warn against at page 40 of their brief, but into which respondents themselves have fallen, along with the Supreme Court of Illinois.

We believe that our original brief herein demonstrates that any finding or decision by the Supreme Court of Illinois against these petitioners upon a non-federal ground is without any fair or substantial support in the law of Illinois established by the Illinois Venue Act (Illinois Revised Statutes, 1941, Chap. 146, § 36) and the construction of that Act in *Central Illinois Public Service Co. v. Industrial Commission,* 293 Ill. 62, 127 N. E. 80, and *Gill v. Lynch,* 367 Ill. 203, 10 N. E. 2d 812. Those two decisions, which are the only Illinois decisions other than those now under review construing and applying the Illinois Venue Act, clearly establish that petitioners' respective actions were "commenced" within two years after petitioners' causes of action accrued, and that the courts in which such actions were commenced possessed, by virtue of the Illinois Venue Act, the power and authority to transfer petitioners' actions to courts having the power to hear and determine such actions. Those two decisions were not overruled by the decisions here under review, but

were written around to such an extent that, in petitioner Herb's case, the Supreme Court of Illinois said:[7]

> "We think the interpretation of the venue statute in the Gill case conclusively is against appellant."

This, notwithstanding that the Gill case clearly ruled valid the commencement of an action in a court which was without jurisdiction to hear and determine it, as well as ruling valid the transfer of such action, by change of venue under the Illinois Venue Act, to a court having jurisdiction to hear and determine it, and ruled invalid only the proceedings between the commencement of the action and the transfer of it to the proper court.

Conclusion.

In conclusion, we submit that the decisions of the Supreme Court of Illinois in the cases here under review are based upon a decisive federal question, viz.: the interpretation and construction of Section 6 of the Federal Employers' Liability Act; that the interpretation and construction of that section of the Federal Act by the Illinois Supreme Court is erroneous in that it placed upon petitioners not only the requirement of commencing their actions within two years after their causes of action accrued, but an additional requirement—not made or authorized by that Act—of commencing their actions within such time in courts having jurisdiction to hear and determine the actions; that, if the decisions of the Supreme Court of Illinois were not based upon that federal question which was so erroneously determined, but were based upon non-federal questions regarding the time of commencement of actions in, and the jurisdiction of, the Illinois courts, then, the decisions below were plainly untenable, and without any fair or substantial support, because not decided according to the established law of Illinois, but by "writing

[7] 51 N. E. 2d, l. c. 282, R. 32 in Case No. 24.

around" the plain language of the Illinois statutes and decisions establishing the law upon such questions, so as to discriminate against the rights of petitioners arising under federal law, and so as to preclude review by this Court.

Accordingly, we respectfully submit that the judgments and decisions below should be reversed, and these causes remanded, in order that petitioners may have a trial of their respective actions upon the merits.

Respectfully submitted,

ROBERTS P. ELAM,
Counsel for Petitioners.

MARK D. EAGLETON,
JOSEPH B. McGLYNN,
Of Counsel.